(42)

No. 05-184

IN THE
Supreme Court of the United States

SALIM AHMED HAMDAN,
PETITIONER,

v.

DONALD H. RUMSFELD, ET AL.,
RESPONDENTS.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE DAVID HICKS IN SUPPORT OF PETITIONER

MARC A. GOLDMAN*
MICHAEL B. DESANCTIS
CRAIG E. ESTES
JENNER & BLOCK LLP
601 13th St. N.W.
Suite 1200 South
Washington, D.C. 20005
(202) 639-6009

ANDREW A. JACOBSON
DAVID E. WALTERS
OMAR R. AKBAR
JENNER & BLOCK LLP
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

JOSHUA L. DRATEL
JOSHUA L. DRATEL, P.C.
14 Wall Street, 28th Floor
New York, NY 10005
(212) 732-0707

MAJOR MICHAEL D. MORI
U.S. MARINE CORPS
OFFICE OF MILITARY
COMMISSIONS
OFFICE OF THE CHIEF DEFENSE
COUNSEL
1931 Jefferson Davis Highway
Suite 103
Arlington, VA 22202
(703) 607-1521

*Counsel of Record
Attorneys for Amicus Curiae David Hicks

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INTEREST OF THE AMICUS CURIAE[1]

David M. Hicks is an Australian national who has been unlawfully detained by Respondents at Guantanamo Bay for more than four years. As they have with Salim Hamdan and several other detainees, Respondents have brought criminal charges against Hicks and declared him eligible for trial before a military commission. On June 10, 2004, the Respondents charged Hicks with "offenses" that they contend constitute violations of the laws of war. The only "facts" the government has alleged in support of these spurious charges amount to nothing more than that Hicks was part of an organization whose members were fighting against United States troops in Afghanistan.

Hicks filed a habeas petition challenging his confinement on February 19, 2002, and two amended petitions challenging the military commission proceedings. The current second amended petition was filed on August 31, 2004. Respondents moved to dismiss the second amended petition, and on November 1, 2004, Hicks moved for summary judgment.

Hicks' interest in the current proceedings stems from the fact that in his petition, he raised the same two challenges at issue here, namely that Congress has not authorized the commissions and hence they are inconsistent with the separation of powers; and that the commissions will fail to provide the procedural protections guaranteed by the Geneva Conventions. In addition, Hicks raised an issue that Hamdan plans to address as subsidiary to the separation of powers

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[1] Counsel of record for the parties have consented to the filing of this brief, and letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or part, and no persons or entity other than counsel for David Hicks authored this brief. No persons made a financial contribution for the preparation or submission of this brief.

issue: that the charges against him did not amount to violations of the law of war at all and thus did not provide jurisdiction for commission proceedings. Finally, Hicks raised issues that are not presently before the Court, including (1) that the commissions are structurally biased and in other vital ways failed to provide the impartial tribunal required by the Due Process Clause; and (2) that the commissions violate the Equal Protection Clause because the government may use them only to try non-citizens. Because these critical challenges are not at issue here, Hicks will not address them. It is important, however, that this Court understand that the issues currently before it concern only some of the fundamental flaws in the commission process. Many of the same procedural flaws that render the commissions unlawful under the Geneva Conventions, for example, also render them unlawful under the Due Process Clause.

None of the challenges Hicks has raised to the commission process have been resolved. After Judge Robertson decided in Hamdan's case that the military commissions violated the principle of separation of powers and were incompatible with the Geneva Conventions, the government agreed not to hold a commission to try Hicks until after the Hamdan appeal. The district court then stayed Hicks's case and the commission process until the D.C. Circuit released its opinion reversing Judge Robertson. After the Hamdan opinion was released, the government publicly indicated its intent to proceed against Hicks within a few months. The district court then requested a new series of briefs in Hicks's case in light of the D.C. Circuit decision.

After this Court granted certiorari in the instant case, the district court again stayed both its own proceedings with respect to Hicks and the commission process against him. It did so because a favorable ruling by this Court on Hamdan's

petition will render use of the current commission process to try Hicks illegal. Because he is similarly situated to Hamdan, Hicks has the strongest of interests in the instant case. He submits this brief as amicus curiae because his perspective on the arguments supporting the petition may be helpful to this Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Executive seeks to prosecute Hamdan for allegedly violating the law of war by joining a "conspiracy." Hamdan intends to argue as a subsidiary to his separation of powers argument that conspiracy is not a violation of the law of war and thus the charge does not confer jurisdiction on the commission. We here explain that the question of whether conspiracy is a crime under the law of war is a critical independent question that has been the focus of much of Hicks's argument below. This Court must therefore either address that question squarely, and resolve it in Hamdan's favor, or make clear that it is leaving that question unresolved.

We then address an issue that is fundamental to the second question before the Court: whether Hamdan can invoke the protection of the Geneva Conventions. We explain that the Executive intends to prosecute Hamdan under the law of war while failing to accord him the procedural protections that very law provides. The Executive effectively asserts that unlike Hamdan himself, the Executive is free to violate the law of war without *any* judicial limitation even when conducting a prosecution under that law.

The Geneva Conventions are a central part of the law of war. One critical question in this case is the substantive scope of those Conventions, but that is not a question we address here. The limited purpose of this amicus brief with

respect to the second question before the Court is to address Respondents' assertion that even if the Conventions apply fully to Hamdan and entitle him to particular procedural protections during his trial for alleged war crimes, Hamdan has no right to judicial enforcement of those protections, because the Conventions are not self-executing.

The question here is not the abstract one addressed by the D.C. Circuit: whether the Conventions can be judicially enforced in general. The question is the much narrower, much clearer question of whether the procedural protections of the Conventions can be invoked defensively in a prosecution for a violation of the laws of war. The answer to that question is yes.

Hamdan must be able to invoke the procedural protection of the Conventions while he is being prosecuted under the law of war for three independent and mutually-reinforcing reasons. First, Congress has explicitly required application of the procedural protections of the laws of war in Article 21 of the Uniform Code of Military Justice, 10 U.S.C. § 821 ("Section 821"). That renders the question of whether the Geneva Conventions are self-executing merely academic in this case. Second, by prosecuting Hamdan under the law of war, the Executive is obliged to accept the procedural protections that law provides. Finally, contrary to the conclusion of the D.C. Circuit, the Geneva Conventions are self-executing here in that they can be asserted by a person tried for violations of the law of war. Whether or not the Convention drafters, or Senate ratifiers, intended the Conventions to be invoked in other contexts absent implementing legislation, there is absolutely nothing to indicate that they intended to require such legislation to invoke the Conventions defensively during a prosecution for violations of the law of war. As a result, the general

presumption in favor of finding self-execution applies fully here.

The notion that Hamdan cannot rely on the Conventions to define his rights and defenses during a prosecution under the law of war cannot withstand the collective weight of these legal authorities, precedents and principles. The Geneva Conventions are a central part of the law of war under which Hamdan is being prosecuted. The Conventions have been ratified by the United States and are therefore the supreme law of the land. Congress has expressly established that grave breaches of the Conventions constitute a war crime. And Congress has expressly determined that military commissions will only have jurisdiction where it is consistent with the law of war, which encompasses the Geneva Conventions. For all of these reasons, this Court should find the procedural protections of the law of war applicable in a prosecution under that very law. It need not address the broader question of whether the Geneva Conventions could be invoked affirmatively as a private right of action.

ARGUMENT

I. THIS COURT SHOULD EITHER SQUARELY ADDRESS THE CONSPIRACY QUESTION OR MAKE CLEAR IT IS NOT DECIDING IT.

Hicks has come to understand that subsidiary to Hamdan's argument that Congress has not authorized military commissions at all in the present conflict, Hamdan intends to argue that Congress has not authorized trial of the specific charge against him -- conspiracy, because that falls outside of the law of war. Because Hamdan mentioned this issue only in a perfunctory manner below, the D.C. Circuit did not discuss it. It is critical that this Court understand that regardless of the attention that Hamdan devotes to the issue, the issue is one of central importance to Hicks and other detainees. This Court must either squarely address this issue

(and conclude that conspiracy is not within the jurisdiction of military commissions) or make clear that it is not now reaching the issue.

The issue of whether particular charges fall within the jurisdiction of military commission does not depend on the more general question of whether Congress has authorized commissions at all. This Court had held repeatedly that a military commission has no jurisdiction if the charges it is addressing do not amount to valid charges under the law of war.[2] And, as discussed further below, Congress has expressly limited commission jurisdiction to violations of the law of war. In part, this is because military commissions are an anomaly in American law. Where military commissions have jurisdiction, they may conduct trials without adhering to all of the precise constitutional requirements designed to protect individuals in criminal trials. As a result, their jurisdiction has always been narrowly circumscribed. *Reid v. Covert*, 354 U.S. 1, 25 (1957) ("[T]he jurisdiction of military tribunals is a very limited and extraordinary jurisdiction [that,] at most, was intended to be only a narrow exception to

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[2] *See, e.g., In re Yamashita*, 327 U.S. 1, 13 (1946) ("Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge preferred against him is of a violation of the law of war."); *Ex parte Quirin*, 317 U.S. 1, 29 (1942) ("We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial."). In its order creating the military commissions, the Bush Administration recognized this limit. "[I]t is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals." Notice, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833, § 1(e) (Military Order of Nov. 13, 2001).

the normal and preferred method of trial in courts of law.") (plurality opinion).

For that reason, the first issue that Hicks raised in his summary judgment motions (both pre-and-post *Hamdan*), and one that occupied the main portion of his briefs, is that the charges against him -- conspiracy, aiding the enemy, and attempted murder by an unprivileged belligerent -- do not violate the law of war at all and thus do not fall within the jurisdiction of military commissions. Hicks explained that the law of war was originally a system of "common law" based on "*universal* agreement and practice." *Ex parte Quirin*, 317 U.S. 1, 30 (1942). Beginning in the late 19th century, much of the law has been set forth in international conventions and treaties. These sources do not support the charges against Hicks. Hicks submitted three unrefuted expert affidavits to demonstrate that none of the charges against him amount to a violation of the law of war. With respect to the charge of attempted murder by an unprivileged belligerent, for example, Hicks explained that this charge amounted to nothing more than a claim that he had allegedly fought in a war against the United States without a uniform -- which does not violate the contemporary law of war, and which would have transformed countless United States soldiers (and spies), members of the French resistance, and virtually everyone who fought the United States in Afghanistan into war criminals.[3]

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[3] Although the government relied on *Quirin* to support this charge, Hicks explained that the soldiers in *Quirin* were guilty of the separate law of war violation of perfidy, which depends on use of trickery, and a domestic statutory crime of spying. Hicks further explained that whatever may have been true at the time of *Quirin*, as of today, it is clear that "unprivileged belligerency" does not amount to a violation of the law of war. The absence of a uniform "merely takes off a mantle of immunity from the defendant" who is thereby subject to prosecution under a country's domestic law but does not itself make him guilty of a war

With respect to conspiracy, Hicks and his expert affiants explained among other things the following:

- In most countries of the world (148 of 192), particularly civil law countries, conspiracy has never been a valid charge in any context. Bassiouni Aff. ¶ 10 (attached as Ex. 8 to Revised Br. in Support of Pet'r Hicks, Civ. A. No. 02-299 (D.D.C. filed Sept. 7, 2005) (hereinafter "Hicks Dt. Ct. Br.")).

- In all of international law, the crime of conspiracy has only been accepted in the very narrow contexts of conspiracy to commit genocide and conspiracy to commit a crime against peace (to wage an aggressive war), both of which are distinct from the law of war. Cassesse Aff. at 2-3 (attached as Ex. 11 to Hicks Dt. Ct. Br.)

- When the United States attempted to introduce the concept of conspiracy to international law at Nuremberg, it was rejected as applicable to the law of war. It was accepted only with respect to the specific crime of planning an aggressive war, a crime against peace which was a distinct category under the Nuremberg Charter from the laws of war. *See The Nuremberg Trial*, 6 F.R.D. 69, 111 (Int'l Mil. Tribunal 1946) ("the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war"); *United States v. Pohl*, No. 4 (Nuremberg Mil. Tribunal II Nov. 3, 1947) ("[T]he Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense.").

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crime. *See, e.g.*, Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* 31 (2004). Of course, the question of whether unprivileged belligerency is a war crime is not at issue in this case since it has not been charged against Hamdan.

- The sole reference to conspiracy in international criminal law conventions or international judicial decisions since Nuremberg (such as the four Geneva Conventions and those establishing International Criminal Tribunals in Yugoslavia and Rwanda) have appeared in connection to genocide (a crime against humanity), not the law of war. Of the 281 conventions applicable to 28 categories of international crimes, only 5 contain any reference to conspiracy at all and none of these involve the law of war. Bassiouni Aff. ¶¶ 7-9 (attached as Ex. 8 to Hicks Dt. Ct. Br.).

- The most recent multilateral statement of international law, the Rome Statute, deliberately deleted all references to conspiracy from initial drafts of the statute, showing the consensus of the international community that it is not a separate crime. *Compare* Proceedings of the Preparatory Commission at Its Eighth Session (24 September-5 October 2001), U.N. Preparatory Commission for the International Criminal Court, 8th Sess., at 13, U.N. Doc. PCNICC/2001/L.3/Rev.1, 13 (2001) (including the term "conspiracy" in one of the proposed definitions of the crime of aggression) *with* 1998 Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (July 17, 1998), *reprinted in* 37 I.L.M. 999 (1998), available at http://www.un.org/law/icc/statute/romefra.htm.

- Reference in international criminal law to the concept of "joint criminal enterprise," does not remotely suggest that conspiracy is a violation of the law of war. Each international convention that refers to joint criminal enterprise does so as a theory of individual responsibility, much like the theory of command responsibility this Court considered in *Yamashita*. *In re Yamashita*, 327 U.S. 1 (1946) As such, an individual charged with a

particular substantive offense -- such as use of poison gas -- could be held accountable as, for example, a member of a joint criminal enterprise that perpetrated the crime. *But the individual could not be charged with the separate and non-existent substantive "crime" of "joint criminal enterprise."* Cassesse Aff. at 1 (attached as Ex. 11 to Hicks Dt. Ct. Br.). Moreover, the required elements to establish individual responsibility as a member of a joint criminal enterprise are different than those for conspiracy, as defined by Respondents, and require a degree of involvement that the government did not allege against Hicks. *See* 1998 Rome Statute of the International Criminal Court, art. 25(3)(d)(i), (ii).

- A few references to conspiracy in domestic sources involving convictions of 50 to 150 years ago, cannot establish the "*universal* agreement and practice" necessary to show conspiracy is a violation of the international law of war as it exists today, *Ex parte Quirin*, 317 U.S. at 30.

- Based on existing international conventions and custom, the consensus of legal scholars, who are one important source of the law of war, is that there is no crime of conspiracy in the law of war. *See, e.g.*, Antonio Cassesse, *International Criminal Law* 191 (2003); George P. Fletcher, *Rethinking Criminal Law* 646 (2000); Gerhard Werle, *Volkestrafrecht* 165 (2003); Schmitt Aff. ¶¶ 22-26 (attached as Ex. 10 to Hicks Dt. Ct. Br.), Bassiouni Aff. ¶¶ 5, 7-10 (attached as Ex. 8 to Hicks Dt. Ct. Br.). As Professor Cassesse, former President of the International Criminal Tribunal for the former Yugoslavia and former Chairman of the United Nations International Commission of Inquiry into Genocide in Darfur explains: "the conspiracy offense listed in MCI No. 2 and charged against Mr. Hicks is not a valid

offense under international criminal law." Cassesse Aff. at 1 (attached as Ex. 11 to Hicks Dt. Ct. Br.).

Because the issue of conspiracy is being addressed in another amicus brief, Hicks will not further discuss this issue here. But what is critical to him is that this Court should either squarely resolve the conspiracy issue in Hamdan's favor or make clear that it is not deciding it. What it should not do is to decide the conspiracy issue against Hamdan based on the misconception that it is not one of the central issues concerning the legality of the commission proceedings. For Hicks, this issue has been a linchpin of his defense both in his habeas petition and in motions filed with the commission.

II. SECTION 821 REQUIRES APPLICATION OF THE PROCEDURAL PROTECTIONS OF THE LAW OF WAR.

A second question in this case concerns the applicability of the Geneva Conventions. This Court should enforce the procedural protections of the Geneva Conventions because Congress has required their implementation in this context by statute. In Section 821, Congress limited the jurisdiction of military commissions to trials that comport with the procedural protections guaranteed by the Conventions.

The D.C. Circuit ignored this statute in holding that even if the Geneva Conventions bar the procedures under which the government seeks to try Hamdan, Hamdan could not invoke those Conventions because they are not judicially enforceable. *Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005). In doing so, it reversed the district court's conclusion that the Third Geneva Convention was self-executing. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 165 (D.D.C. 2004). The D.C. Circuit was wrong with respect to self-execution, as discussed in Part IV below. But it was also wrong because it ignored Section 821, which limits the

jurisdiction of military commissions to prosecutions that comport with the laws of war. In effect, this Court need not address the question of whether the Geneva Conventions are self-executing because Congress has executed them in this context. They are part of the jurisdictional limits that Congress has established by statute for the prosecution of war crimes.

A. The Statutory Limit.

As noted above, the jurisdiction of military commissions has always been limited. In Section 821, Congress expressly limited commission jurisdiction to prosecutions consistent with the law of war -- except where Congress explicitly conferred additional jurisdiction, which it has not done here.[4] The full text of Section 821 reads:

> Art. 21. Jurisdiction of courts-martial not exclusive. The provisions of this chapter [10 U.S.C. §§ 801 *et seq.*] conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses *that* by statute or *by the law of war may be tried by military commissions*, provost courts, or other military tribunals.

10 U.S.C. § 821 (emphasis added). By explaining that it had not made the jurisdiction of courts martial exclusive with respect to the specified categories, Congress made clear that it had made court martial jurisdiction exclusive outside those categories.

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[4] There is a separate question in this case as to whether Section 821 provides an affirmative source of commission jurisdiction, a question we do not address here, but it is incontrovertible that Section 821 defines the outer limit of any commission jurisdiction that does exist.

This Court has recognized that Section 821 limits the jurisdiction of military commissions. As stated above, it has recognized that military commissions have no jurisdiction over charges that do not constitute violations of the law of war. Section 821 does more than limit commission jurisdiction to violations of the law of war, however. If that were the only limit Congress intended, Section 821 would have simply said so. Instead, Section 821 limits military commission jurisdiction to offenders or offenses that "*by the law of war* may be tried by military commissions...."[5] In limiting jurisdiction to trials that may occur "by the law of war" in military commissions, Section 821 expressly limits jurisdiction to trials allowed by the law of war. Trials using procedures that violate the law of war are not allowed by the law of war, and thus are precluded by Section 821.

The only other textually plausible reading of Section 821 would be that Congress authorized commissions to try offenders and offenses that the law of war assigns to military commissions as opposed to offenders or offenses it assigns to a different adjudicative body. But that reading would be nonsensical, because the international law of war does not assign offenses to military commissions. It makes no specific reference to the United States concept of military commissions at all. What the law of war does, and what Section 821 effectuates, is to define certain classes of offenders and offenses and dictate the procedures under which the offenders can be tried for these offenses -- regardless of the name a particular country assigns to the tribunal in which they are tried. The law of war thus permits trial in a "military commission" when the commission

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[5] As noted, Section 821 also provides jurisdiction to military commissions where expressly authorized by statute, but that provides no basis of jurisdiction here. There is no statutory authorization of the military commission trial of Hamdan.

adheres to the required procedures and precludes such trial otherwise.

Thus, when Congress referenced offenses or offenders that *by the law of war* may be tried in military commissions, Congress was not concerned with the semantic designation of the body conducting the trial. It did not intend to permit the Executive to confer jurisdiction on a star chamber, for example, by calling it a military commission. Rather, Congress was concerned with the structure and procedures established for the "military commission." It is these, and not the body's name, that must be consistent with the law of war, including the Geneva Conventions, which are an integral part of the law of war as shown in Part B *infra*.[6]

This Court has recognized that prosecutions in military commissions must comport with the laws of war. In *In re Yamashita*, 327 U.S. at 9, this Court explained that "Congress by sanctioning trials of enemy aliens by military commissions for offenses against the law of war ha[s] recognized the right of the accused to make a defense." Hence, this Court explicitly considered Yamashita's claim that two different provisions of an earlier version of the Geneva Convention protected him. *Id.* at 20-21 and 23-24. Though the Court ultimately concluded that neither provision applied to Yamashita, it rejected the claims on the merits rather than on the grounds that the Conventions could not be asserted as a defense in a trial under the laws of war.

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[6] The procedures of the adjudicative body must be consistent with the law of war with respect to the "offenders or offenses" to be tried. Congress drafted Section 821 in this manner because in some cases the validity of the structure and procedures used will depend on the offenders or offenses charged. For example, some procedural protections of the law of war apply only to prisoners of war. Geneva Convention Relative to the Treatment of Prisoners of War art. 102, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 ("Geneva Contention III").

The conclusion that Section 821 bars prosecutions that violate the laws of war is cemented by the longstanding principle that statutes should be interpreted in a manner consistent with the United States' international obligations. As this Court explained in *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), statutes should be interpreted consistently with United States treaties and customary international law if it is possible to do so. *See also Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004). Here, it is not only possible to interpret Section 821 consistent with the United States' international obligations, that is the best interpretation.

Thus, by limiting commission jurisdiction to offenders and offenses that "by the law of war" may be tried by military commissions, Congress focused the jurisdictional question on whether the structure and procedures of the adjudicative body are consistent with the law of war, which in some cases may depend on the offender and offenses to be tried. In other words, Congress required all commission trials to be ones that are conducted "by the law of war." And because Congress did so by statute, the statutory limitations imposed by Section 821 are fully enforceable by the federal courts on habeas review.

B. The Geneva Conventions Are Part of the Law of War as Recognized by this Court.

The Geneva Conventions are an integral part of the law of war. Much of the law of war is customary law, evolving through practice of nations over time. International treaties are a means of codifying that law and defining it more precisely. The Geneva Conventions have been a primary means of this codification. They entered into force on October 21, 1950. One hundred and ninety one nations have ratified the Conventions. *See* ICRC, *States Party to the Geneva Conventions and Their Additional Protocols* (April

12, 2005), *at* www.icrc.org/web/eng/siteeng0.nsf/html. Each of the four conventions were ratified by the United States in July of 1955. Regulations jointly promulgated by the Army, Navy, Air Force, and Marine Corps have consistently treated the Geneva Conventions as binding. *See* Army Regulation 190-8/OPNAVINST 3461.6/AFJI 31-304/MCO 3461.1, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* ch. 1-5(a)(2) (1997); Dep't of the Army, Field Manual No. 27-10, *The Law of Land and Warfare* (1956) (reprinting the Geneva Convention for use by U.S. Army personnel). Both international criminal conventions and United States statutes define grave breaches of the Geneva Conventions to constitute war crimes.[7]

This Court has in the past relied on treaties, including the Geneva Conventions, as a primary means of defining the laws of war and thus the jurisdictional limits of military tribunals. *See In re Yamashita*, 327 U.S. at 13-16, 20-24 (looking to the Hague Conventions and the Geneva Convention of 1929 to determine that the law of war supported both the substantive charges against General Yamashita and the "command responsibility" theory under which he was held liable); *Johnson v. Eisentrager*, 339 U.S. 763, 787-88 n.13 (1950) (looking to the Fourth Hague Convention of 1907 to determine whether the act charged was a violation of the law of war). And Respondents here

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[7] *See* 1998 Rome Statute of the International Criminal Court, art. 8(2)(a) & 8(b)(2), UN Doc. A/CONF.183/9 (July 17, 1998), *reprinted in* 37 I.L.M. 999 (1998), available at http://www.un.org/law/icc/statute/romefra.htm ("war crimes" consist of "[g]rave breaches of the Geneva Conventions of 12 August 1949" and "[ot]her serious violations of the laws and customers [of international armed conflict]. . .within the established framework of international law"); 18 U.S.C. § 2441(c) (defining war crimes as part of War Crimes Act to constitute "a grave breach" of one of three sources of law: the 1949 Geneva Convention; specific articles of the Hague Convention; and the 1996 Amendments to the Geneva Convention).

have conceded the role of the Geneva Conventions in defining the law of war. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d at 160 ("The Third Geneva Convention is acknowledged to be part of the law of war.") (citing 10/25/04 Tr. at 55).

As a result, when Section 821 limits the jurisdiction of military commissions to trials "by the law of war," it necessarily requires trials within the structure permitted by the Geneva Conventions. Put another way, Congress has executed the Geneva Conventions in this particular context. Thus, it is irrelevant whether the Geneva Conventions are self-executing. Those Conventions limit the procedures under which Hamdan may be tried because Congress has by statute required military commission trials to adhere to the law of war and thus to the Geneva Conventions. Whatever the status of the Geneva Conventions in other circumstances, Congress has clearly rendered the Conventions enforceable in trials conducted by military commission. As Judge Robertson explained in a conclusion not addressed by the D.C. Circuit, "The [Third Geneva] Convention is implicated in this case by operation of the statute that limits trials by military tribunal to 'offenders...triable under the law of war.'" *Hamdan v. Rumsfeld*, 344 F. Supp. 2d at 164.

III. THE GENEVA CONVENTIONS ARE JUDICIALLY ENFORCEABLE IN THIS CONTEXT BECAUSE THE EXECUTIVE HAS BROUGHT A PROSECUTION UNDER THE LAWS OF WAR.

The Geneva Conventions are also enforceable here because the Executive Branch is relying on the law of war as the source of its authority to prosecute Hamdan and thus necessarily obligates itself to adhere to the procedural protections of that law.

It is only by dint of judicial recognition of the law of war that the Executive claims authority to prosecute Hamdan in

the first place. After all, Hamdan is not being prosecuted under a United States criminal statute. He is being prosecuted for purported violations of the common law of war. The Executive thus relies on judicial recognition of that law not only as a source of the claimed jurisdiction of military commissions, but also as the source of substantive law under which Hamdan is being prosecuted.

By choosing to prosecute Hamdan under the law of war, the Executive has obligated itself to apply the entirety of that law. By analogy, this Court has long held that a statute must be taken in its entirety: any attempt to segregate or exclude any portion of an act from consideration of another is "almost certain to distort legislative intent." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). From its earliest cases, this Court has followed this "whole act" rule in construing statutes. *See, e.g. United States v. Fischer*, 6 U.S. (2 Cranch) 358 (1805); *Priestman v. United States*, 4 U.S. (4 Dall.) 28, 29 (1800) (per curiam); *see also* William N. Eskridge, *Cases and Materials on Legislation* 830 (3d ed. 2001) (discussing the whole act rule). The Executive must therefore take the law of war as a whole. Indeed, symmetry is a simple but vital element of legal justice. In *Wardius*, this Court noted that it has traditionally "been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial." *Wardius*, 412 U.S. at 474 n.6 (citing *Washington v. Texas*, 388 U.S. 14, 22 (1967) and *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)).

The importance of procedural fairness is particularly important in a criminal prosecution. The Executive has previously recognized that violation of the procedural protections of the law of war, including the Geneva Conventions, constitutes a war crime in its own right. In *Yamashita*, the government charged Yamashita with, among

other things, permitting "members of the armed forces under his command to try and execute...prisoners of war, subjecting to trial without prior notice to a representative of the protecting power, without opportunity to defend, and without counsel." 327 U.S at 24 n.10 (internal quotation marks omitted). The Government charged that such acts violated the notice provisions of Article 60 of the Geneva Convention. Although this Court did not find that the Geneva Conventions barred Yamashita's conduct, it found that "independently of the notice requirements of the Geneva Convention, it is a violation of the law of war, on which there could be a conviction if supported by evidence, to inflict capital punishment on prisoners of war without affording to them opportunity to make a defense." *Id.*

Thus, the Executive previously relied on this Court to enforce its right to try Yamashita criminally for prosecuting prisoners of war without adhering to the procedural protections of the laws of war. That same Executive has no basis for claiming that this Court cannot enforce those same protections to limit it from prosecuting Hamdan without adhering to the laws of war. Indeed, such a claim would be particularly preposterous here where the Executive is prosecuting Hamdan for a purported violation of the customary law of war while arguing that Hamdan cannot invoke the codified law of war. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) ("[T]he greater the degree of codification and consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it").

The laws of war have long been cognizable in United States courts. "From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations

as well as enemy individuals." *Ex parte Quirin*, 317 U.S. at 27-28. The laws of war are controlling insofar as they do not conflict with acts of Congress. "We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution." *In re Yamashita*, 327 U.S. at 16. Here, as we have seen, respect for the laws of war is not inconsistent with the command of Congress, but rather carries out its direction in Section 821. Indeed, Congress has defined grave breaches of the Geneva Conventions to be war crimes. *See supra n. 7.*

This Court therefore should enforce the law of war it has long recognized as binding by allowing Hamdan to assert his rights guaranteed by the very law under which he is being prosecuted. It is only by virtue of the binding nature of the law of war that the Executive has any purported basis to prosecute Hamdan at all. This Court must thus ensure that such prosecutions conform to the procedural requirements of the law of war, including the Geneva Conventions.

IV. RATIFICATION OF THE GENEVA CONVENTIONS MADE THEM EFFECTIVE AS A DEFENSE AGAINST A WAR CRIMES PROSECUTION.

Finally, Hamdan is entitled to the protections of the Geneva Conventions because the United States has ratified them. As such, they are the "Supreme Law of the Land" under the Supremacy Clause. U.S. Const. art. VI, cl. 2. Respondents' argument is that the Conventions are not judicially enforceable even though the Constitution makes them the supreme law of the land. But at least since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), United States law has been enforceable judicially except in rare circumstances.

Respondents argue that those rare circumstances apply to the Geneva Conventions, and the D.C. Circuit has agreed. Whether or not that is so as a general matter, however, it is

not so in the narrow context of a criminal prosecution under the law of war. Here, Hamdan seeks to invoke particular procedural protections of the law of war defensively in a prosecution for war crimes. In this context, none of Respondents' arguments overcome the general presumption that laws of the United States are judicially enforceable.

A. Hamdan is Not Seeking to Maintain a Private Right of Action

Some courts have held that the Geneva Conventions are not judicially enforceable because they do not confer a private right of action for individual litigants. *See, e.g. Hamdi v. Rumsfeld*, 316 F.3d 450, 468 (4th Cir. 2003), *rev'd*, 542 U.S. 507 (2004); *Al-Odah v. United States*, 321 F.3d 1134, 1147 (D.C. Cir. 2003) (Randolph, J. concurring) *rev'd remanded sub nom. Rasul v. Bush*, 542 U.S. 466 (2004). Other courts, too, have held treaties unenforceable after concluding that they did not impliedly or expressly create a private right of action for individual litigants. *See, e.g., Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring); *Diggs v. Richardson*, 555 F.2d 848 1850 (D.C. Cir. 1976).

But Hamdan is not relying on the Geneva Conventions to provide a private right of action and he is not asking the Court to infer the existence of such a private right of action in this context or any other. He is simply seeking to invoke the Conventions *defensively* in a criminal prosecution under the law of war. And he is relying on the habeas statute as the procedural vehicle to challenge his custody as a "violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3); *see Hamdan v. Rumsfeld*, 415 F.3d at 40 (recognizing that "[t]he availability of habeas may obviate a petitioner's need to rely on a private right of action").

To the extent some courts have suggested that the absence of a private right of action in a treaty renders it

generally unenforceable, they have conflated two entirely separate inquiries. *Restatement (Third) of the Foreign Relations Law of the United States* § 111 cmt. h (1987). Unless a statute explicitly provides a private right of action, courts will infer one only after a searching inquiry. But statutes are judicially enforceable simply by virtue of being law even when no private right of action exists. Because treaties are the "Supreme Law of the Land," they are equivalent to statutes in this regard. U.S. Const. art. VI, cl. 2; *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam) (stating that treaties are "on full parity" with acts of Congress) (quotation marks omitted); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation."). As Professor Vazquez explains:

> It is a mistake...to assume that a treaty may be enforced in court by private parties only if it confers a private right of action itself. Many treaties, like most constitutional provisions and many federal statutes, do not themselves purport to confer private rights of action. Instead, they typically impose primary obligations on individuals (including government officials) without expressly addressing matters of enforcement. A treaty that does not itself address private enforcement is no less judicially enforceable by individuals than constitutional or statutory provisions that do not themselves address private enforcement. The "'private right of action'" to enforce a treaty may have its source in laws other than the treaty itself....

Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695, 719-20 (1995) (footnote omitted).

Indeed, this Court has frequently allowed individuals to rely on treaties defensively against prosecutions or other deprivations by the state without asking if the treaties conferred a private right of action and without even asking whether the treaties were judicially enforceable. The Court assumed the treaties were enforceable because they were the supreme law of the land and because the treaties did not indicate that they were unenforceable. *See Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (protecting British creditors against debt cancellations by Virginia based on treaty); *United States v. Rauscher*, 119 U.S. 407 (1886) (allowing an alien extradited to the United States to invoke the limitations of the extradition treaty as a defense to the charges against him); *Patsone v. Pennsylvania*, 232 U.S. 138 (1914) (allowing defendant to raise claim that state prosecution for possession of a shotgun by an unnaturalized foreign-born resident was inconsistent with treaty between Italy and United States); *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924) (allowing defendant alien to invoke treaty between United States and Japan as granting the defendant an equal right to engage in trade in the United States).

Whether or not the Geneva Conventions confer a private right of action is thus irrelevant to Hamdan's right to invoke the Conventions here. As Professor Vasquez explains, "even without a 'private right of action,' private individuals may enforce such treaties defensively if they are being sued or prosecuted under statutes that are inconsistent with treaty provisions." Vazquez, *Four Doctrines*, 89 Am. J. Int'l L. at 720.

B. Enforcement of the Conventions Is Not Committed Solely to the Political Branches

The D.C. Circuit nonetheless held that Hamdan could not invoke the Geneva Conventions based on language in the Conventions themselves. Although other briefs will detail

the overwhelming evidence that this is incorrect, we emphasize here that the court: (1) started with the incorrect presumption that treaties are generally not judicially enforceable, (2) misinterpreted the language in the Geneva Conventions, and (3) ignored which specific provisions of the Conventions are at issue here and the context in which Hamdan is seeking to invoke them.

The D.C. Circuit began from an incorrect presumption that treaties are not generally enforceable judicially. Among other cases, it cited *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), for the proposition that treaties are presumptively unenforceable in the courts. *Hamdan*, 415 F.3d at 39. However, *Foster* stands for the opposite proposition. As Chief Justice Marshall explained for the Court:

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished...but is carried into execution by the sovereign power of the respective parties of the instrument.
>
> *In the United States a different principle is established.* Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in the courts of justice as equivalent to an act of legislature, whenever it operates of itself without the aid of any legislative provision.

Id. at 314 (emphasis added). *Foster* thus holds that although treaties may not be considered a legislative act by other nations, treaties are generally judicially enforceable in the United States by virtue of being supreme law under the constitution. As Chief Justice Marshall explained further for the Court in another case, "[t]he reason for inserting [the Supremacy Clause] in the constitution was, that all persons who have real claims under a treaty should have their causes decided by national tribunals." *Owings v. Norwood's Lessee*,

9 U.S. (5 Cranch) 344, 348 (1809); *see also Commonwealth v. Hawes*, 76 Ky. (13 Bush) 697, 702-03 (1878), *cited in United States v. Rauscher*, 119 U.S. 407, 427-29 (1886) (characterizing *Hawes* as a "very able" opinion). As we have seen, this Court has often enforced treaties defensively without even explicitly addressing self-execution. At a minimum, this shows there is a strong presumption in favor of judicial enforcement of treaties.

There are rare exceptions when treaties are not judicially enforceable, but these are very limited in scope. Treaties are not judicially enforceable if the terms of the treaties themselves specify that further legislation is necessary before they can be enforced judicially, or, perhaps, if the President or Senate that ratified the treaty conditioned that ratification on the need for further legislation. As the *Restatement (Third) of the Foreign Relations Law of the United States* § 111(4) (1987), explains, "[i]n general, agreements that can be readily given effect by executive or judicial bodies, . . . without further legislation, are deemed self-executing, unless a contrary intention is manifest. Obligations not to act, or to act only subject to limitations, are generally self-executing." *Id.* § 111, rep. note 5, at 54. The Restatement further adds that "there is a strong presumption that the treaty has been considered self-executing by the political branches, and should be considered self-executing by the courts" unless the Executive requested implementing legislation and Congress enacted it. *Id.* § 111, rep. note 5, at 53.

In ratifying the 1949 Geneva Conventions, neither the Executive nor the Senate requested implementing legislation for the provisions at issue here; nor did they indicate the need for such legislation. To the contrary, the ratification history of the Geneva Conventions establishes the Senate and Executive's belief that the Conventions generally were self-executing upon ratification, and thus enforceable in the

courts.[8] At the time of ratification, the Senate Foreign Relations Committee made clear its view that there were only four provisions that required implementing legislation, none of which are at issue here.[9] The fact that the political

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[8] See S. Exec. Rep. No. 84-9, at 30 (1955) (stating that "[f]rom information furnished to the [Senate Foreign Relations Committee] it appears that very little in the way of new legislative enactments will be required to give effect to the provisions contained in the four conventions"). The regulations of the Army, Air Force, Navy, and Marine Corps recognize that the Conventions are binding. Army Regulation 190-8, § 1-5(a)(2), § 1-1(b)(4) (citing the Geneva Conventions as the legal basis for the military's authority to promulgate the regulations, and stating that "[i]n the event of conflicts or discrepancies between this regulation and the Geneva Conventions, the provisions of the Geneva Conventions take precedence"); Dep't of the Army, Field Manual 27-10, (reprinting the Conventions for use by U.S. Army personnel).

[9] The four provisions that the Committee thought would require implementing legislation dealt with (1) restrictions on the commercial use of the Red Cross emblem; (2) the provisions of workers' compensation rights to injured civilian detainees; (3) exemption of relief shipments from customs; and (4) a requirement that POW camps be identified with the letters PW, PG, or IC. S. Exec. Rep. No. 84-9, at 30-31. In addition, Article 129 of the Third Convention requires signatory nations to enact legislation in order to punish violations of Article 130, which defines "grave breaches" under the Third Convention. However, both the Senate and the Executive believed that United States' criminal law would be sufficient to punish "grave breaches" of the Conventions, and did not pursue implementing legislation at that time. *See Geneva Conventions for the Protection of War Victims: Hearing on Executives D, E, F, and G Before the Senate Comm. on Foreign Relations*, 84th Cong. 24 (1955) (statement of Richard R. Baxter, Office of the General Counsel, Dep't of Defense); S. Exec Rep. No. 84-9 (1955), reprinted in 84 Cong. Rec. 9958, 9970 (1955) (stating that the "committee is satisfied that the obligations imposed upon the United States by the "grave breaches" provision are such as can be met by existing legislation...."). In fact, Congress forty years later found existing legislation to be inadequate and enacted legislation making these provisions enforceable. War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104. This only underscores Congress' belief in the importance of the Conventions and their judicial enforcement.

branches considered various provisions of the Geneva Conventions to be unenforceable without implementing legislation creates a strong inference that the ratifiers considered other provisions of the Conventions to be judicially enforceable without such legislation.

In its ruling, the D.C. Circuit did not address this history. Instead, it pointed to Articles 8, 11, and 132 of the Geneva Conventions, which address how disagreements between signatory nations ought to be settled. *Hamdan*, 415 F.3d at 39-40. Those provisions provide that if there is a dispute as to application or interpretation of the Conventions, the respective nations should undertake to settle the dispute by allowing the Protecting Power under the Conventions to serve as an umpire. *Id.*

These provisions do not, however, remotely suggest an intent to preclude judicial enforcement, as they do not state that they are providing an exclusive means of enforcement. It is commonplace that a statutory scheme providing a specific means of enforcement does not eliminate other means of enforcement provided by law. *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423-424 (1987). Clearly, the United States did not believe the Geneva Conventions could be enforced only through political action between states when it prosecuted Yamashita in part for failing to adhere to the procedural protections of the Conventions. Nor do other nations believe this. The International Criminal Tribunal for Yugoslavia and the Tribunal for Rwanda, both signed by the United States, each provide for prosecuting individuals who violate the Geneva Conventions. *See* United Nations, Statute of the ICTY, art. 2(f), S.C. Res. 827, U.N.SCOR, 48th Sess., 3217th mtg. at 2, U.N. Doc. S/RES/827 (1993), 32 I.L.M. 1203; Statute of the ICTR, art. 4, S.C. Res. 955, U.N.SCOR, 49th Sess., 34534d

mtg. at 3, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598, 1600 (same).

At least as important, Articles 8, 11 and 132 of the Geneva Conventions are wholly inapplicable to Hamdan's claims. These provisions only address conflicts *between signatory nations* as to the application or interpretation of the Conventions. Hamdan is not asserting the rights of a signatory nation under the Conventions; he is defensively asserting *his rights as an individual* under *separate sections* of the Conventions. The provisions cited by the D.C. Circuit are entirely irrelevant to the question of whether those sections on which Hamdan relies are judicially enforceable. *See, e.g., Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985) (a treaty may be enforceable with respect to some provisions and not others).

To support its conclusion, the D.C. Circuit also appeals to Article 1 of the Geneva Conventions, which states that parties to the Convention should "undertake to respect and to ensure respect for the present Convention in all circumstances." This hardly precludes judicial enforcement, however. To the contrary, one important way of ensuring respect for the Conventions is judicial enforcement -- the way chosen by the United States through the constitutional provision that makes treaties the "Supreme Law of the Land."

Finally, Article 1 of the Geneva Conventions is essentially a preamble -- a preliminary and general statement that is merely meant to explain the Conventions' purpose. As such, under basic principles of statutory interpretation, it cannot undermine the express directives of the provisions Hamdan seeks to invoke. Under rules of statutory interpretation, the generalized language of a preamble cannot create ambiguity in the text of the statute if the specific statutory provision is not ambiguous. *Association of*

American Railroads v. Costle, 562 F.2d 1310, 1316 (D.C. Cir. 1977); 2A Norman Singer, *Sutherland on Statutory Construction* § 47.04, at 221-22 (6th ed. 2000). In contrast, the provisions Hamdan invokes, the Articles of the Conventions dealing with individual rights, are phrased as directives. Article 3 and Article 5 of the Geneva Conventions both state that the protections of the Convention *shall* be afforded to individuals by the detaining power.

Even if it were assumed that the judicial enforceability of the Geneva Conventions is ambiguous and resort to the preamble or other portions of the Conventions is permissible, the presumption in favor of self-execution would render the Conventions enforceable. This Court has held on a number of occasions that courts must favor language in treaties that creates judicially enforceable obligations. *See United States v. Stuart*, 489 U.S. 353, 368 (1989) ("[A] treaty should be generally construed . . . liberally to give effect to the purpose which animates it and that [e]ven where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.") (internal quotation marks omitted; ellipsis in original); *Asakura v. City of Seattle*, 265 U.S. at 342 ("Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."). The Geneva Conventions themselves thus support the conclusion that they are judicially enforceable.

The D.C. Circuit, however, also placed heavy reliance upon a footnote in *Eisentrager*, 339 U.S. at 789 n.14; *Hamdan*, 415 F.3d at 39-40. In *Eisentrager*, this Court noted in dicta, after holding the petitioner had no right to rely on the habeas statute, that certain parts of the Geneva Convention of 1929 concerning the treatment to be

accorded captives were the responsibility of political and military authorities. *Eisentrager*, 339 U.S. at 789 n.14. However, the Court went on to consider on the merits claims under the Geneva Conventions about "procedural regularities said to deprive the Military Commission of jurisdiction," including the claim that the petitioners "were denied trial by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power." *Id.* at 789-90 (internal quotation marks omitted). It rejected that claim based on the substantive scope of the 1929 Geneva Conventions, a scope that changed in the 1949 Conventions. As noted, the Court considered similar claims on the merits in *Yamashita*. Thus, *Eisentrager* does not stand for the proposition that clear rights established in the 1949 Conventions are unenforceable.

In the end, Hamdan must be permitted to invoke the Geneva Conventions defensively in a prosecution under the law of war. There is nothing in the Conventions themselves, or in the ratification history, that demonstrates an intent that they not be enforced judicially in that context even though they are the supreme law of the land.

CONCLUSION

For the reasons provided above, this Court should (1) either squarely address the conspiracy issue and hold that conspiracy is not within the jurisdiction of military commissions or make clear it is not addressing that issue, and (2) hold that the Geneva Conventions are individually enforceable in this prosecution of Hamdan for alleged war crimes.

Respectfully submitted,

MARC A. GOLDMAN*
MICHAEL B. DESANCTIS
CRAIG E. ESTES
Jenner & Block, LLP
601 13th St. N.W.
Suite 1200 South
Washington, D.C. 20005
(202) 639-6009

ANDREW A. JACOBSON
DAVID E. WALTERS
OMAR R. AKBAR
JENNER & BLOCK LLP
One IBM Plaza
Chicago, IL 60611
(312) 222-9350

JOSHUA L. DRATEL
Joshua L. Dratel, P.C.
14 Wall Street, 28th Floor
New York, NY 10005
(212) 732-0707

MAJOR MICHAEL D. MORI
U.S. Marine Corps
Office of Military
Commissions
Office of the Chief Defense
Counsel
1931 Jefferson Davis
Highway, Suite 103
Arlington, VA 22202
(703) 607-1521

*Counsel of Record

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* *Counsel of Record*